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July 28. 1766.

ANSWERS

FOR

PETER RAMSAY, ANDREW WILSON, and others, Counſellors and Burgeſſes of the Burrow of *Pittenweem*,

TO THE

PETITION of THOMAS MARTIN, and others, Magiſtrates and Counſellors of *Pittenweem*.

IN the complaint preſently depending at the inſtance of the reſpondents, for ſetting aſide the laſt Michaelmaſs elections of the town of Pittenweem, as being brought about by means of bribery and corruption; three incidental queſtions lately occured. The firſt related to the prorogation of the term for the examination of witneſſes, and the conſequences of that prorogation; the ſecond reſpected the depoſitions of Margaret Ounſton and Chriſtian Thomſon, whoſe depoſitions the reſpondents thought had been improperly taken, and therefore petitioned to have expunged from the record of the proof. The laſt queſtion is ſimilar to the one now mentioned, and relates to the expunging from the proof, the depoſition of the Reverend Mr Chieſly miniſter of the goſpel at St. Monance.

Your Lordſhips interlocutor upon the firſt of theſe points is final; but the petitioners have reclaimed againſt your judg-

ment upon the other two points; and the following anſwers are humbly offered in ſupport of your Lordſhips interlocutor.

On all occaſions, when the parties, upon any incidental points, have come before your Lordſhips, they have mutually arraigned each other in the conduct of the proof, and the improper and dilatory manner in which it has been carried on; but the reſpondents at preſent ſhall avoid inveſtigations of that nature, as there will be full opportunity for your Lordſhips to judge of this when the proof is brought before you. One obſervation, however, will not eſcape the attention of your Lordſhips, that if the petitioners are guilty of the corrupt practices laid to their charge, their intereſt in every delay is too obvious to need illuſtration. But, on the other hand, expedition and diſpatch is manifeſtly the intereſt of the reſpondents, whether the petitioners ſhall in the event be found guilty or innocent of the charge brought againſt them: To ſay no more therefore, there is at leaſt a poſſibility that the petitioners may have an intereſt to delay the determination of this cauſe; but the very expence of it to the reſpondents, without one circumſtance to counterbalance that conſideration, demonſtrates the impoſſibility that they can have any intereſt to poſtpone a determination.

Your Lordſhips interlocutor upon the firſt point now in queſtion, "has ordained the depoſitions of Margaret Ounſton "and Chriſtian Thomſon to be expunged."

The petitioners, in reclaiming againſt this part of your Lordſhips interlocutor, have admitted the impropriety of examining witneſſes *in hoc ſtatu*, to prove previous expreſſions of malice againſt a witneſs, who has been purged upon oath of malice againſt any of the parties; and they have likeways admitted the incompetency of adducing witneſſes, to prove that the witneſs has given an account of any matter different from that which is given upon oath. Both theſe propoſitions are admitted; but the petitioners contend, that they are intitled to adduce theſe two witneſſes, in order to prove a fact againſt a witneſs, which the witneſs herſelf has denied upon oath.

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Upon this queſtion, the parties have involved themſelves in a long diſpute concerning the nature of an action of reprobator, and the particulars in which it is allowed of; and it muſt be confeſt, that altho' our writers upon the law have ſaid much upon this action, and altho' queſtions relative to it, eſpecially in former times, have frequently come before your Lordſhips predeceſſors, yet the nature of this action is by no means laid down with that preciſion which might have been expected, and it is extremely probable that this may have ariſen from that change in the practice of your Lordſhips, of allowing acts before anſwer, and a reaſonable latitude to the parties, in proving what facts and circumſtances they may think material for their intereſt.

But notwithſtanding the uncertainty of the nature of this action, and the change of the practice in matters of proof, the reſpondents are adviſed, that there is no example whatever, where your Lordſhips have allowed an incidental proof, to be led upon an act and commiſſion, where the tendency of that proof had no further connection with the ſubject-matter upon which the parties had joined iſſue, than merely to throw a ſlur upon the character of a witneſs. If a witneſs in the courſe of a proof, ſhall ſwear raſhly and falſely upon any of the matters that have gone to proof, then, no doubt, the parties have an indirect title to render the character of the witneſs ſuſpicious, by redarguing what is ſaid upon the ſubject-matter of the proof itſelf; but, to bring a witneſs, not with the view to ſay any one thing relative to the matter upon which the parties have joined iſſue, but merely to prove that another witneſs has ſworn falſely, is, with ſubmiſſion, what cannot be allowed of in an incidental manner upon the act and commiſſion which has been iſſued by your Lordſhips, but muſt either be done by an action of reprobator, if the falſehood is *in initialibus*, or by a common action on the head of perjury, if the falſehood is *in ſubſtantialibus* of the oath.

The petitioners ſay, that if they are not to be allowed to diſcredit witneſſes in this manner, they will be deprived altogether

together of the benefit of their exculpatory proof, becauſe the tendency of that proof, is to diſcredit and take off the force of the culpatory proof, as the petitioners term it.

But this apprehenſion is altogether imaginary, and proceeds entirely upon a want of attention to the nature of an exculpatory proof, and the obvious difference there is betwixt that and the attempt now made. The reſpondents have already admitted, and do ſtill admit, that the petitioners have a clear title to redargue every word a witneſs has ſaid upon oath, provided the proof led for that purpoſe relates to the matters upon which the parties have gone to proof: For example, Suppoſe a witneſs ſhould ſay, that a bribe was given by one perſon to another, at a particular place, and at a particular time, all and each of the particulars contained in ſuch an averment, are proper ſubjects of an exculpatory proof. It is competent to prove, that either the perſon who is ſaid to have given the bribe, or the perſon who is ſaid to have received the bribe, were not at the place, nor at the time condeſcended upon where and when the bribe is ſaid to have been given; and if the defenders in a charge of bribery, ſhould be ſucceſsful in eſtabliſhing thoſe exculpatory facts, ſuch a proof would no doubt amount to a proof of perjury on the part of the witneſs who ſaid ſo, and the defenders would be juſtly intitled to eſtabliſh that perjury incidentally upon the act and commiſſion which had gone out, becauſe that perjury directly tended to hurt the intereſt of the defenders in thoſe very matters upon which the parties had joined iſſue and gone to proof.

Now the petitioner will be pleaſed to compare the attempt which they now make, with the inſtance juſt given, whereby the reſpondent's meaning will be fully illuſtrated, and they themſelves, if they chuſe it, will clearly perceive the difference betwixt what they now attempt to prove, and the real nature of an exculpatory proof. Their averment is, That Anne Thomſon, before ſhe was brought upon oath, uſed expreſſions of malice againſt the Martins; and when brought upon oath, ſhe denied thoſe expreſſions. They do not pretend

tend to ſay, that they ſhould be allowed a proof of this malice; they have admitted this to be improper; but they inſiſt they ſhould be allowed to prove that Anne Thomſon upon a certain occaſion ſaid, She had malice againſt Martin. Now the reſpondents beg leave to aſk, Whether it would, in any reſpect whatever, diminiſh the force of the proof of bribery adduced by them, altho' it ſhould be proven that this witneſs had upon a certain occaſion ſaid, She had malice againſt the Martins? That fact might be extremely true, and yet it is not in the leaſt degree inconſiſtent, nor does it in any degree extenuate or detract from the truth of any one act of bribery ſworn to by Anne Thomſon herſelf, or any other witneſs in this cauſe.

Yes, ſay the petitioners, it takes off the force of it, in this view, that it throws a ſuſpicion upon the veracity and credibility of Anne Thomſon, one of the witneſſes who has ſworn to the bribery.

But this is a latitude of proof, which the ſmalleſt attention to the practice and the law of this country will ſhow to be clearly reprobated: And to ſhow this, your Lordſhips have only to attend to a thing which too often occurs in proofs led before Commiſſioners, and of which ſome very notorious examples have occurred in the conteſts which have taken place relative to this diſtrict of burrows. What the reſpondents allude to is, the conſtant attempt made by parties, both in the courſe of civil and criminal buſineſs, to adduce evidence in order to prove either a bad character, or even bad actions, againſt a witneſs examined in the courſe of the proof; but ſo often as attempts of this kind have been judged of, they have been as often diſcountenanced and condemned by your Lordſhips. The petitioners may perhaps have heard what paſt with regard to an objection offered againſt one Halliday, a ſchoolmaſter, in one of the proofs which have been lately carried on, relative to this diſtrict of burrows. It was offered to be proven, that he was a notorious liar; and that he was guilty of many groſs acts of falſehood and fraud of different kinds; but your Lordſhips ordered the objection to be

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expunged from the proof, as injurious and calumnious, and would allow no proof to be led with regard to the facts offered to be proven, altho' the facts were ſpecially condeſcended upon.

Now the petitioners will be pleaſed to reconcile what has been juſt now mentioned, which is but one of many examples which might be produced of the uniform practice of your Lordſhips in queſtions of this kind, with the doctrine which they now plead. If it were allowable to adduce proof, merely to throw ſuſpicion upon the veracity of a witneſs, altho' not confined to the ſubject-matter of the proof itſelf, upon what principle could your Lordſhips, in every caſe whatever, refuſe a proof as to the character of a witneſs? for ſurely, If I could prove a witneſs to be either a liar, a calumniator, a forgerer, or guilty of any other crime the moſt flagrant that can be ſuppoſed, it cannot be denied but that a proof of ſuch facts would undoubtedly tend to throw a ſuſpicion upon the veracity and credibility of ſuch a witneſs. This is ſufficient to ſhow, that it is not enough to alledge that a proof will tend to detract from the credibility of a witneſs, in order to obtain ſuch a proof. A party is at full liberty to examine what witneſſes are thought proper to redargue the depoſition of a witneſs, in ſo far as that depoſition relates to the facts *in cauſa*, and upon which the parties have joined iſſue and gone to proof; but it would be endleſs and out of all ſight, if parties, as in the preſent caſe, were allowed inſidiouſly to aſk queſtions at witneſſes, noways relative to the points in iſſue, merely with the view of afterwards bringing witneſſes to contradict thoſe facts.

The caſe of the Mignons in the Douglas cauſe, alluded to by the petitioners, has no ſimilitude to the preſent queſtion; for if a party ſhall have reaſon to ſuſpect, either that the witneſſes have been improperly taught, or that any improper influence has been uſed with them, either to add more than they really knew, or to conceal part of what they really did know, it is highly proper that thoſe facts ſhould be expiſcate, becauſe they are intimately connected with the ſubject-matter

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upon which the parties have gone to proof. Such was the caſe with the Mignons in the Douglas cauſe. It was ſuſpected that part of their knowledge upon which they ſwore, had been gathered from papers which had been improperly diſtribute, and put into their hands. The queſtion was accordingly aſked, Whether they had ſeen any ſuch papers? and upon oath they ſolemnly denied it; which laid one of the parties under the neceſſity to redargue them by other witneſſes, who not only proved that they had ſeen them, but that the witneſſes themſelves had borrowed thoſe very papers from the perſons who had denied they had ſeen them. The intimate connection of ſuch a proof with the real ſubject-matter of the cauſe, is extremely obvious, and clearly differences that caſe from the one now in hand.

The reſpondents therefore hope, upon the general principles which have been laid down, that your Lordſhips will be of opinion, that the proof now attempted by the petitioners is highly improper; and that the refuſal of it will by no means tend to diminiſh the utility of that exculpatory proof, which by modern practice is indulged to all defenders.

But the reſpondents beg leave to carry their argument upon this point ſtill further, and to beg your Lordſhips attention to the particular *ſpecies facti*, which is now under conſideration,

The queſtion put to Anne Thomſon: The anſwer to which, now propoſed to be redargued, is, " Whether ſhe ever ſaid " ſhe would do the Martins an ill turn, and that they deſer- " ved it at her hand, *or words to that meaning?*" She in anſwer deponed, " That ſhe never did ſay ſo; and that ſhe nei- " ther has, or bears any ill-will to the Martins, or to any of " the reſpondents in this cauſe."

Upon the manner in which the queſtion is here put to the witneſs, it will be evident to your Lordſhips, that it is ſimply impoſſible, by any proof whatever, to redargue the anſwer made by this witneſs. It is not pretended to be proven, nor is the queſtion aſked at her, Whether ſhe ever ſaid *totidem verbis*, " I have malice againſt the Martins?" but the queſtion aſked,

aſked, is, Whether ſhe ever uttered words expreſſive of malice againſt the Martins? The witneſs ſays, She never did. Now in what manner is this propoſed to be redargued? It is propoſed to adduce two witneſſes to prove, that in their hearing, Anne Thomſon uttered expreſſions which imported malice againſt the Martins. The fartheſt that ſuch a proof could go, would be to prove, that theſe two witneſſes apprehended the words uttered by Anne Thomſon to contain an expreſſion of malice; but could it be maintained that this would have the effect to redargue the poſitive teſtimony of Anne Thomſon herſelf, who declares, that ſhe never bore malice againſt the Martins, and never ſpake maliciouſly of them? When there is a diſcrepancy betwixt a perſon who ſpeaks, and thoſe who hear, upon the import of the words ſpoken, it never was heard of, that the meaning given to words by the hearer was adopted, in oppoſition to the meaning put upon theſe words by the ſpeaker; and yet this rule muſt of neceſſity be adopted, before your Lordſhips could pay the leaſt regard to any proof which can be brought by the petitioners in this caſe, to redargue the teſtimony of Anne Thomſon; for the utmoſt that any witneſſes could ſay, is, That they underſtood certain words uttered by Anne Thomſon to import expreſſions of malice from her; in oppoſition to which, your Lordſhips would have the teſtimony of the witneſs herſelf, deponing, That no words uttered by her were ſpoke with any ſuch meaning and intention.

That ſuch is the ſpirit by which your Lordſhips judge of the import of words uttered by a perſon, is obvious from ſimilar caſes. *Vide* Dict. Deciſions, vol. 2. p. 195. "In a "matter of fact, where there was penury of witneſſes, it be- "ing objected againſt one of them, after he had deponed, "That he was ultroneous in coming to the meſſenger, and "deſiring himſelf to be cited, and ſo *prodiderat teſtimonium*; "the Lords conſidering that this was *nuda emiſſio verborum*, the "import whereof might be eaſily miſtaken; therefore they "found it only probable by the witneſs's own oath, and

"granted

" granted diligence to re-examine him." Fount. 13th July 1700, Goodine *contra* Murray.

The like, where it was objected againſt a witneſs, " That " he had declared he would ſwear beſt to them who paid him " beſt." Fountainhall, 17th July 1707, Livingſtone *contra* Menzies.

Upon this laſt caſe, altho' the objection ſeems to be founded upon words ſtrong, and in which there could be little ambiguity, ſtill your Lordſhips, upon the principles laid down, would not allow any other meaning to be put upon theſe words, than what the witneſs himſelf ſhould think proper to do. And indeed, if more argument upon this ſubject were neceſſary, it might be ſtill further illuſtrated by the proof, which alone can be admitted to prove a verbal promiſe, namely, the oath of party, beſides a variety of ſimilar examples which will readily occur to your Lordſhips.

Another obſervation upon this point the reſpondents muſt beg leave to ſubmit to your Lordſhips, wherein this witneſs ſeems to have juſt ground to complain of the petitioners conduct. If they meant a fair expiſcation of the truth, as they now pretend, it would have been no more than juſtice to the witneſs to have examined her more particularly with regard to this converſation which ſhe is ſaid to have had with Margaret Ounſton and Chriſtian Thomſon; it would have been fair to have interrogate her particularly, Whether ſhe had ever any converſation upon this ſubject with theſe two perſons? and, if ſhe had peremptorily denied ever her having any converſation at all with them upon the ſubject, they would at leaſt have had ſome more room for ſuſpicion than they can now with juſtice pretend to have: But, in place of a fair examination of this kind, they aſk her this general queſtion, Whether ſhe had ever ſaid ſo and ſo? And, to redargue this, they would propoſe to adduce two witneſſes to ſwear, that once in their hearing ſhe had made uſe of certain expreſſions. If any ſuch converſation ever happened, or if this witneſs ever did emit any expreſſions of this kind, it is more than probable, that, if ſhe had been put in remembrance of the time, or the

occaſion, or the perſons to whom ſhe is ſuppoſed to have ſaid ſo, the witneſs might have been able to give a very ſatisfactory meaning to her own words, very different from what the petitioners would now endeavour to put upon ſome dropping expreſſions, ſaid to have been tranſiently emitted by her in preſence of two particular perſons.

It is ſaid in the petition, that at leaſt the depoſition of Margaret Ounſton ought to remain as part of the proof, and not to be expunged, becauſe no objection was made to her by the reſpondents agents or counſel.

But this argument will weigh little with your Lordſhips, when you attend to this circumſtance, that, when the witneſs was firſt adduced, the reſpondents agents could not poſſibly know for what purpoſe ſhe was adduced, nor what was the tendency of her examination; but, ſo ſoon as her examination was over, and the purport thereof diſcovered, an objection was immediately entered upon the part of the reſpondents, againſt her oath being admitted as part of the proof, and againſt receiving any other witneſſes, for the ſame purpoſe of reprobating the teſtimony of preceeding ones, in ſo unuſual and incompetent a manner. The petitioners however inſiſted not only upon her depoſition, but inſiſted to go on in the ſame improper manner, and actually did obtain the examination of the other witneſs Chriſtian Thomſon, who, your Lordſhips will be informed, is niece to one of the petitioners, and, upon that footing alone, an inhabile witneſs for them, altho' the fact was, at the time of her examination, unknown to the reſpondents.

Upon all theſe grounds, it is humbly hoped, your Lordſhips will have no difficulty in adhering to that part of your interlocutor, ordaining the depoſitions of Margaret Ounſton and Chriſtian Thomſon to be expunged.

The petitioners, ſatisfied that your Lordſhips would not be inclined to alter this part of your interlocutor, have further prayed upon this head, that at any rate a reſervation may be made to them of a power to inſiſt in an action of reprobator againſt Anne Thomſon, as accords; which, it is ſaid,

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the complainers themſelves have admitted was competent for the reſpondents to do.

With regard to any admiſſion of this kind by the reſpondents, if any ſuch took place, it cannot poſſibly avail the petitioners in this demand which they are pleaſed to make; for, if an action of reprobator is to be inſiſted in, the reſpondents are not the party moſt intereſted, for Anne Thomſon herſelf muſt be cited in ſuch an action, whom no admiſſion by the reſpondents can injure. But, if the petitioners are well founded in this action of reprobator, there is to be ſure nothing in the preſent interlocutor of your Lordſhips which can prevent them inſiſting in ſuch an action: But the reſpondents will be ſo open as to tell them, that if they do inſiſt in ſuch an action, the firſt ſtep in the proceſs will be to condeſcend upon the reprobatory facts which they intend to prove in that action; and, unleſs they can ſay ſomething more than they have yet ſaid againſt this witneſs, it is believed your Lordſhips will ſave them the trouble of proceeding further than a condeſcendence.

The reſpondents now proceed to the other part of your Lordſhips interlocutor, againſt which the petitioners have reclaimed: " You have ordained the depoſition of Mr John " Chiefly to be likewiſe expunged from the proof:" And the petitioners have prayed your Lordſhips, " To find that the " depoſition of the Reverend Mr Chiefly muſt alſo remain " and make a part of the proof, at leaſt to ſuperſede deter- " mining whether his depoſition ſhould be expunged or not, " till the whole proof is printed and laid before your Lord- " ſhips."

Uppn this point the petitioners have maintained three propoſitions: 1*mo*, That Mr Chiefly has not given partial counſel in this cauſe: 2*do*, That, on account of penury of witneſſes, Mr Chiefly ought to be admitted, altho' otherwiſe an exceptionable witneſs in this cauſe: 3*tio*, That there is a penury of witneſſes upon the part of the petitioners.

With regard to the firſt point, the reſpondents muſt be pardoned to think, that, if Mr Chiefly has not given partial

counſel

counſel to the reſpondents in this cauſe, they are at aloſſ to know what is meant by that expreſſion in the law of Scotland.

And, in the firſt place, your Lordſhips will be informed, that when the anſwers were to be made to the reſpondents complaint reſpecting the election of Pittenweem, Mr Alexander ſhowed a ſcroll of thoſe anſwers to this Mr Chieſly; and ſo much was Mr Chieſly in the intereſt of the petitioners, and on the footing of giving them counſel and advice, that he new modelled and corrected thoſe anſwers; for it having been admitted in theſe anſwers, that a bargain had been intended with regard to the town of Pittenweem, but that this intention had been laid aſide when it appeared that there was to be a diviſion in the council, Mr Cheifly, upon ſeeing the ſcroll, found fault with the admiſſion, and ſaid to Mr Alexander, that he thought he ſhould not have mentioned at all Bailie Martin's firſt intention, but left them even to make out that in the way of proof. This is an anecdote which, it is believed, Mr Chieſly will not not now take upon him to deny: And it is ſubmitted to your Lordſhips, if a ſtronger proof can be adduced to ſhow, that, from the very commencement of this cauſe, Mr Chieſly was in the ſecrets of the petitioners, and on the footing of giving them partial counſel and advice.

Such being his conduct at the beginning of the cauſe, his behaviour in the after progreſs of it, will appear from his own oath, upon which the objection was made, however ſingular the ſtrain of that oath in other reſpects may be: This will beſt appear to your Lordſhips from the words themſelves: "Being interrogate for the complainers, If, or not, he has "given advice to Mr Alexander, or the agent, or any other "employed by Mr Alexander in this cauſe, with regard to "conducting the evidence, as to what facts could be pro-"ven, or by what witneſſes? depones, That he has ſaid to "Mr Alexander himſelf, or ſome of his friends, that he heard "*ſuch* and *ſuch* repreſentations of *ſuch* and *ſuch* facts; "and that he *believed ſuch* and *ſuch* witneſſes would be proper

"to

" to be called in the caſe to prove or diſprove. Being in-
" terrogate, When he came laſt to town, and whether ſince
" that time he has ſuggeſted any queſtions to be put to the
" witneſſes in this cauſe, or any facts to be proved, or any
" perſons to be adduced? depones, That, *as he thiuks*, that as
" he mentioned, *or may* have mentioned *ſuch* and *ſuch* witneſ-
" ſes to prove or diſprove *ſuch* and *ſuch* facts, or *repreſentations*,
" he *may* alſo have *hinted* at the particular way of proving or
" diſproving theſe; and *belives* he may have done ſo ſince he
" came to town, which was on Monday laſt. Depones, That
" he did in writing ſuggeſt, ſince he came to town, both
" facts and the names of witneſſes; and which writing he
" gave in to Mr Alexander, *as he thinks, at leaſt Mr Alexander*
" *was in the room when he gave it*. Depones, That Mr Alex-
" ander did mention to him, that, if he knew of any thing
" that could be of ſervice in this affair, he would take it *kind*
" and *friendly* if he would ſuggeſt it. Depones, That ſince
" he came to town, *he has ſuggeſted objections which he thought might*
" *be made againſt ſome of the witneſſes in this cauſe*. Depones,
" That he was not cited till laſt night, about ſeven o'clock:
" That he did not know that he was to be cited, till he came
" to town; and that he came to town to bring home his
" wife, who had been left here indiſpoſed. Depones, *He has*
" *informed Mr Alexander, that he knew of facts that might be*
" *material in this cauſe, and informed him ſo, both by writ and*
" *word of mouth*; but that this was before he was
" ſummoned, or knew that he was to be ſummoned in
" the cauſe; and that after he had ſo informed Mr Alexan-
" der by word of mouth, he deſired the deponent might put
" it in writing, for the ſake of his, Mr Alexander's, memory.
" And depones, That he mentioned no facts to Mr Alexan-
" der, or any other perſon employed by him, ſince he was
" cited."

From this depoſition your Lordſhips will obſerve the following facts clearly eſtabliſhed: 1*mo*, That he informed Mr Alexander, or ſome of the petitioners friends, of different facts and repreſentations which he had heard. 2*do*, That he

informed him of the witneſſes proper to prove or diſprove theſe facts and repreſentations. 3*tio*, That he hinted at the particular way of proving or diſproving theſe facts. 4*to*, That he reduced into writing both the facts, and the names of the witneſſes for proving thoſe facts, which he delivered to Mr Alexander, or at leaſt when Mr Alexander was in the room. 5*to*, That Mr Alexander ſpoke to him upon a kind and friendly footing, to ſuggeſt what he knew would be of ſervice in this affair. 6*to*, That he accordingly, both by writing and word of mouth, informed Mr Alexander what facts he thought would be material in the cauſe, and even facts that he himſelf knew and could ſwear to. *Laſtly*, That he ſuggeſted the objections proper to be made to ſome of the witneſſes in the cauſe.

All and each of thoſe particulars are eſtabliſhed by Mr Chieſly's own oath; and as, in the reſpondents apprehenſion, any one of them amounts to the objection of partial counſel, in the language of the law, it would be very ſurpriſing if all of them, conjoined in one, ſhould not be ſufficient to diſqualify a witneſs upon the footing of partial counſel.

Upon this branch of their argument, the petitioners have been pleaſed to found upon the opinion of Lord Stair, in theſe words: "Witneſſes become inhabile, by giving partial "counſel, as by inſtigating the plea, *telling the party of his inte-* "*reſt*, and offering to depone in his favour, or being preſent "with him at conſultations with lawyers, *where it might be* "*ſhown what was neceſſary to be proved*; but it is no partial coun- "ſel, though perſons be interrogated by parties, what they "know of ſuch affairs, generally or particularly, if the mo- "tion ariſe not from themſelves."

From theſe laſt words the petitioners ſeem to infer, that Mr Chieſly's conduct does not fall under the deſcription of giving partial counſel, becauſe he has neither inſtigated the plea, nor told the party of his intereſt, offering to depone in his favour, nor been preſent at conſultations with lawyers. But if it were any way neceſſary for the reſpondents argument, he could be able, without much criticiſm, to ſhow that Mr Chieſly does fall within the expreſs terms of my Lord

Stair's

Stair's opinion. This however is by no means neceſſary; for the petitioners are egregiouſly miſtaken, if they ſuppoſe there is no other ſpecies of partial counſel than what is mentioned by Lord Stair: His Lordſhip does not mention theſe particulars, as excluſive of other kinds of partial counſel, but only mentions them as a very few of the many examples which fall under that technical expreſſion of giving partial counſel.

And in this view your Lordſhips will conſider the different particulars proven by Mr Chieſly's own depoſition, compared with the examples mentioned by Lord Stair. It is ſaid by his Lordſhip, that a perſon who has told a party of his intereſt, or who has been preſent at conſultations with lawyers, where it might be ſhown what was neceſſary to be proved, falls under the objection of partial counſel. Will it then, after what Mr Chieſly has told in his oath, be maintained, that he has told none of the parties of their intereſt? The reaſon aſſigned for excluding perſons who have been preſent at conſultations with lawyers is, becauſe there they might learn what was neceſſary to be proved. Is the caſe of Mr Chieſly weaker than this, whom there was no neceſſity to ſhow what was neceſſary to be proved. He himſelf is the *primum mobile* in the cauſe. He tells what was neceſſary to be proven for the petitioners, and what witneſſes were to prove theſe facts. He tells what allegations of the reſpondents it was neceſſary to diſprove, and what witneſſes are proper for the purpoſe; and he further tells what objections were competent againſt the particular witneſſes adduced by the reſpondents.

After all this, it is left with your Lordſhips to judge, whether Mr Chieſly's conduct, falls under the genuine deſcription of partial counſel, or if his conduct is aſcribable to that innocent unbiaſſed information to which the latter words of Lord Stair do clearly allude.

The ſecond propoſition maintained by the petitioners is, that, on account of penury of witneſſes, Mr Chieſly ought to be admitted, although otherways an exceptionable witneſs in this cauſe. And in ſupport of this propoſition, the petitioners have referred to the authority of our law-writers, and to

ſome

ſome deciſions of your Lordſhips, whence it appears that at times witneſſes, though not ſtrictly legal, have been admitted on account of a *penuria teſtium*.

It is not the generality of this propoſition which the reſpondents mean to diſpute, but the application of it to the caſe in hand. It does not appear that our writers upon the law, in matters of evidence, have on all occaſions properly adverted to a diſtinction, which however has been uniformly attended to in practice: It is this, Whether the objection to the witneſs ariſes from his own conduct, or if it ariſes from other perſonal qualities and circumſtances in which there is no blame on the part of the witneſs? In the former caſe, a *penuria teſtium* is not received as an excuſe for the admiſſion of a witneſs who would otherways be rejected. In the latter caſe, a *penuria teſtium* will be admitted as a reaſon for admitting witneſſes otherways inhabile.

To illuſtrate this doctrine by examples. In the caſe either of marriages or domeſtic crimes, perſons otherways inhabile on account of alliance and near connection, will be admitted as witneſſes, becauſe the privacy with which marriages are uſually ſolemnized, and the ſecrecy of domeſtic crimes, renders it improbable, and in moſt caſes impoſſible to have any other witneſſes, except perſons who are nearly allied and connected with the parties. But here your Lordſhips will be pleaſed to obſerve, that the exception to the witneſs ariſes from conſiderations and circumſtances, in which there occurs no blame or miſconduct on the part of the witneſs; and it is in ſuch caſes as thoſe now put, that the excuſe of a *penuria teſtium* has at any time been received.

As an example of an oppoſite kind: Put the caſe of a perſon who has received a good deed or reward in order to give evidence, or who has given partial counſel to any of the parties, as in the preſent caſe: In thoſe caſes, the objection ariſes from the impropriety of conduct in the perſon who is offered as a witneſs. In the firſt caſe, it was equally criminal in the witneſs, as in the party-adducer, to lay a foundation for the objection, that the integrity of the witneſs was

corrupted

corrupted by good deeds, or the promiſe of rewards: And in like manner, in the caſe of partial counſel, the witneſs is diſqualified by his own act in giving partial counſel, or by the act of the party-adducer, who thought proper to make uſe of him in a character incompatible with the integrity and the impartiality of a witneſs; and accordingly, if ſome examples have not eſcaped the inveſtigations of the reſpondents, they will venture to ſay, that in the caſes above mentioned, or in ſimilar caſes, a *penuria teſtium* has never been admitted as an excuſe for the admiſſion of a witneſs diſqualified by his own act, or by the act of the party-adducer.

As to the peculiarity mentioned in the end of Mr Chieſly's oath, namely, that he gave this partial counſel before he was ſummoned as a witneſs; that will no ways avail the petitioners: For if that excuſe was to be admitted, upon the ſame rule a party would be intitled to adduce his own agent, or any other perſon with whom he was moſt intimately connected, provided he took care to take the whole uſe he intended of him, before he gave him a citation to appear in evidence. It is not the giving partial counſel, of which the reſpondents complain: If Mr Chieſly thinks that an office conſiſtent with his own character, the reſpondents have no concern in the matter; but they are intitled to take care, that, after he has given that partial counſel, he ſhall not be adduced as an evidence in their cauſe, when by his own conduct he has brought himſelf into a ſtate of mind which takes of the poſſibility of his remaining an unbiaſſed and impartial witneſs.

The laſt point inſiſted upon by the petitioners in this branch of their argument is, that there is a penury of witneſſes on the part of the petitioners.

It will be unneceſſary for the reſpondents to dwell long upon this part of the petition, becauſe they hope they have already ſatisfied your Lordſhips, that altho' in this caſe there was that kind of penury to which the law ſome times pays regard, that ſtill the exception of partial counſel, which has been offered againſt Mr Chieſly, was an objection of that nature

which could not be got over on account of a *penuria teſtium*.

But the reſpondents, for the ſatisfaction of your Lordſhips, will go a point further, in order to demonſtrate to your Lordſhips the abſurdity of that *penuria teſtium*, which is reſorted to by the petitioners on the preſent occaſion. When the law talks of a *penuria teſtium*, it always relates to ſome poſitive fact, which either by chance, or from a peculiarity of circumſtances, happen to fall under the obſervation of very few perſons, as in the caſe of a clandeſtine marriage, or a domeſtic crime: But it is for no ſuch thing as this that the petitioners have deſired the teſtimony of Mr Chieſly. It is not to a fact, but to a converſation they want to have his evidence, that is, to converſations which paſſed betwixt him and Mr Martin or Mr Alexander.

Now, your Lordſhips will be pleaſed to advert to the curioſity of this demand; both Mr Martin and Mr Alexander are inhabile witneſſes on the part of the petitioners, and your Lordſhips will not allow their depoſitions to be taken, in order to tell that the one did not bribe, and that the other was not bribed. But altho' your Lordſhips will not allow thoſe perſons themſelves to tell this, even upon oath, yet the petitioners contend, that the depoſition of Mr Chieſly ſhould remain, in order to ſhow what Mr Martin or Mr Alexander have ſaid to him upon this ſubject, when they were not upon oath. This appears to be the real ſtate of the caſe, and your Lordſhips will judge whether this is that *penuria teſtium* which the law, in particular caſes, has admitted as an excuſe for the adducing of evidence, otherways exceptionable.

Nor will it in any degree alter the caſe, or ſtrengthen the claim of the petitioners to the depoſition of Mr Chieſly, altho' another miniſter, or a thouſand miniſters, may have ſworn in the ſame manner as Mr Chieſly; for after all it comes to the ſame thing, namely, What Bailie Martin has ſaid to this or that perſon. It is not pretended that there is any particular fact which fell under the obſervation of Mr Chieſly, or any other perſon, as to which there is a penury, but becauſe

Mr

Mr Beath the miniſter of Pittenweem has ſworn to one converſation with Bailie Martin, where the Bailie told him, the town was not bribed; therefore it is demanded that Mr Chiefly's account of another converſation ſhould ſtand, where it is ſaid, Bailie Martin ſaid the ſame thing to him.

It is inſinuated that Mr Chiefly's examination ſhould not be expunged, becauſe the reſpondents expreſſed their intention to acquieſce in the judgment of Mr Roſs the Commiſſioner, who, notwithſtanding the objection, found that Mr Chiefly ought to be examined: But this is by no means a real ſtate of the fact. It is extremely true, that the reſpondents ſubmitted their objection to Mr Roſs the Commiſſioner, but they neither ſaid nor meant to tye themſelves down, if they ſhould think proper to demand redreſs from your Lordſhips. Upon looking into the proceedings before the Commiſſioner, the reſpondents can diſcover no ſuch obligation as is here alledged; and your Lordſhips will not incline to hamper them, or tye them down to an erroneous judgment by the Commiſſioner, becauſe ſome tranſient expreſſions may have paſt at the examination.

Neither can the reſpondents agree to the demand, that your Lordſhips ſhould grant a reprieve to Mr Chiefly's depoſition till the reſt of the proof ſhall be finiſhed: For, if this was to be gone into, the petitioners might be allowed, upon the ſame rule, to examine every one of their agents in the cauſe, and indeed every one of the parties themſelves, in order that your Lordſhips might be able to judge, whether, at the concluſion of the proof, thoſe agents and parties agreed with or contradicted one another. This precedent might be of leſs conſequence if your Lordſhips were always ſitting, to whom the parties could have ready acceſs; but as this proof muſt go on in vacation, if other witneſſes were as improperly examined as Mr Chiefly has been, his caſe would be argued upon as a precedent why ſuch depoſitions ſhould not be expunged from the proof.

The petitioners conclude with intreating your Lordſhips, that, if you ſhould remain of the opinion of your interlocutor,

you

you would, at leaſt for the vindication of Mr Chieſly's character, throw ſome reaſon into your interlocutor, becauſe improper conſtructions might be put upon your Lordſhips interlocutor without doors.

As this is a thing in which the reſpondents have no proper intereſt, your Lordſhips will no doubt do in it as to yourſelves ſhall appear moſt proper. Perhaps, if your Lordſhips ſhould view this matter in the ſame light as the reſpondents do, you may not be inclined to think that Mr Chieſly's oath deſerves that judicial panegyric which the petitioners are pleaſed to demand for it: And as to what may be thought without doors, your Lordſhips are not in uſe to publiſh *popular* interlocutors; and indeed there is the leſs reaſon for it in the preſent caſe, becauſe Mr Cheiſly's oath, and the argument of the parties upon it, is now in print by means of the preſent diſpute; ſo that the world has full light and materials to judge for itſelf.

Upon the whole, it is humbly hoped your Lordſhips will be of opinion of adhering to your interlocutor in both points reclaimed againſt.

In reſpect whereof, &c.

HENRY DUNDAS.